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January 29, 2016

Re: 2016 California Public Contract Code Additions and Revisions; Other Relevant Added or Amended Public and Private Works Statutes; and Relevant Public and Private Works Court Decisions

Dear Colleagues:

Please take note of the following 2016 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2015, other related California statutes; and recent court decisions concerning both public and private works contracts. Please review the Table of Contents for those statutes and cases that may be of greatest interest to you.

Community college district clients will also receive a second highlighted copy more directly pertinent to their concerns.

Previous year-end Public Contract review letters can be found on our website at www.jaretlaw.com. If you have any questions, or need further information, please do not hesitate to call.

Best regards for the New Year!

Sincerely,

Phillip A. Jaret, Esq.

CONTENTS

I. PUBLIC CONTRACT CODE ADDITIONS

A. Chapter 6.7 – Construction Manager/ General Contractor Method: Regional Projects on Expressways

This new set of statutes, effective January 1, 2016, provides for an alternative procurement procedure for certain transportation projects performed by a regional transportation agency. These statutes authorize regional transportation agencies to use the Construction Manager/General Contractor project delivery method for the design and construction of certain expressways that are not on the state highway system.

Existing law authorizes the Department of Transportation, the Santa Clara County Valley Transportation Authority, and the San Diego Association of Governments to use the Construction Manager/General Contractor project delivery method for transit projects within their respective jurisdictions, subject to certain conditions and requirements.

Now, regional transportation agencies are permitted to use the Construction Manager/General Contractor project delivery method, to design and construct certain expressways that are not on the state highway system if: (1) the expressways are developed in accordance with an expenditure plan approved by voters, (2) there is an evaluation of the traditional design-bid-build method of construction and of the Construction Manager/General Contractor method, and (3) the Board of the regional transportation agency adopts the method in a public meeting.

PCC § 6970 – Alternative procurement procedure for certain transportation projects; Construction Manager/General Contractor method.

PCC § 6971 – Definitions.

PCC § 6972 – Utilization of Construction Manager/General Contractor method of procurement; contract; entity responsible for maintenance.

PCC § 6973 – Governing processes for Construction Manager/General Contractor method projects.

PCC § 6974 – Completion of project using the Construction Manager/General Contractor method; progress report.

B. PCC § 7203 – Contractor responsibility for delay damages; requirements for enforcement.

This new statute, effective January 1, 2016, provides that a public works contract entered into after January 1, 2016, that contains a clause that expressly requires a contractor to be responsible for delay damages is not enforceable unless the delay damages have been liquidated to a set amount and identified in the public works contract.

C. PCC §10295.35 – Contracts for $100,000 or more; prohibition against contracts where contractor benefits discriminate based on gender identity; confidentiality of employee requests; waiver of requirements

This new statute, under Chapter 2, State Acquisition of Goods and Services, effective January 1, 2016, and similar to the existing § 10295.3, provides that a state agency shall not enter into any contract for the acquisition of goods or services in the amount of $100,000 or more with a contractor that, in the provision of benefits, discriminates between employees on the basis of an employee's or dependent's actual or perceived gender identity, including, but not limited to, the employee's or dependent's identification as transgender.

Existing law authorizes state agencies to enter into contracts for the acquisition of goods or services upon approval by the Department of General Services. Existing law sets forth various requirements and prohibitions for those contracts, including, but not limited to, a prohibition on entering into contracts for the acquisition of goods or services of $100,000 or more with a contractor that discriminates between spouses and domestic partners or same-sex and different-sex couples in the provision of benefits. Existing law provides that a contract entered into in violation of those requirements and prohibitions is void, and authorizes the state or any person acting on behalf of the state to bring a civil action seeking a determination that a contract is in violation and therefore void. Under existing law, a willful violation of those requirements and prohibitions is a misdemeanor.

D. Article 3.3. Los Angeles Unified School District-Best Value Procurement

This new series of statutes provides for a best value procurement method process authorizing its use for projects undertaken by the Los Angeles Unified School District in connection with projects of over $1,000,000.

PCC § 20119 – Legislative intent and findings and declarations.

PCC § 20119.1 – Definitions.

PCC § 20119.2 – Best value procurement; pilot program for projects over one million dollars.

PCC § 20119.3 – Process for awarding best value contracts.

PCC § 20119.4 – Process for selection of best value contractor.

PCC § 20119.5 – School districts using best value procurement method; submission of reports.

PCC § 20119.6 – Best value procurement method in relation to governing board requirements for contracts.

PCC § 20119.7 – Duration of article.

E. PCC § 20653.5 – Purchase under same terms and conditions specified in contract awarded by University of California or California State University

This new statute, under Article 41 applicable to community college districts, now provides that a community college district may purchase materials, equipment, supplies, or services under the same terms and conditions as are specified in a contract awarded by the University of California or the California State University.

F. PCC § 22176 – "Civil openness in negotiations ordinance" or "COIN ordinance" defined; requirements

A new section of codes, under Chapter 4.5 Civic Openness in Negotiations, (22175; 22176; 22177; 22178) is now to be known as the Civic Reporting Openness in Negotiations Efficiency Act, or CRONEY. As noted in §22176, a COIN ordinance means an ordinance adopted by a city, county, city and county, or special district that requires any of the following as part of any collective bargaining process undertaken pursuant to the Meyers-Milias-Brown Act of the Government code as follows:

(1) The preparation of an independent economic analysis describing the fiscal costs of benefit and pay components currently provided to members of a recognized employee organization, as defined in Section 3501 of the Government Code.

(2) The completion of the independent economic analysis prior to the presentation of an opening proposal by the public employer.

(3) Availability for review by the public of the independent economic analysis before presentation of an opening proposal by the public employer.

(4) Updating of the independent economic analysis to reflect the annual or cumulative costs of each proposal made by the public employer or recognized employee organization.

(5) Updating of the independent economic analysis to reflect any absolute amount or change from the current actuarially computed unfunded liability associated with the pension or postretirement health benefits.

(6) The report from a closed session of a meeting of the public employer's governing body of offers, counteroffers, or proposals made by the public employer or the recognized employee organization and communicated during that closed session.

(7) The report from a closed session of a meeting of the public employer's governing body of any list of names of persons in attendance during any negotiations session, the date of the session, the length of the session, the location of the session, or pertinent facts regarding the

negotiations that occurred during a session.

The Meyers-Milias-Brown Act requires the governing body of a local public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of a recognized employee organization.

These statutes establish specific procedures for the negotiation and approval of certain contracts valued at $250,000 or more for goods or services by cities, counties, cities and counties, or special districts that have adopted a civic openness in negotiations ordinance, or COIN ordinance, defined as an ordinance imposing specified requirements as part of any collective bargaining process undertaken pursuant to the Meyers-Milias-Brown Act. It requires the designation of an independent auditor to review and report on cost of any proposed contract that requires a city, county, city and county, or special district to disclose prescribed information relating to the contract and contract negotiations on its Internet Web site. It prohibits a final determination by the governing body regarding approval of any contract until the matter has been heard at a minimum of 2 public meetings of the governing body.

However, it exempts from its provisions contracts required to respond to, recover from, or mitigate the effects of a temporary public safety emergency declared by the chief law enforcement officer of a city, county, city and county, or special district, or a state of war emergency, state of emergency, or local emergency, as those terms are defined in the California Emergency Services Act. It also exempts from its provisions a renewal of a contract if the employees performing the services are covered by a collective bargaining agreement that is governed by the National Labor Relations Act (NLRA).

G. PCC § 22177 – Application of chapter (COIN)

This section lists forth various exceptions. (See above.)

H. PCC § 22178 – Contracts which trigger application of chapter; audit and report; required disclosures; meeting requirements (COIN)

This chapter shall apply to any contracts with a value of at least $250,000, and to any contracts with a person or entity, or related person or entity, with a cumulative value of at least $250,000 within the fiscal year of the city, county, city and county, or special district being negotiating between the city, county, city and county, or special district, and any person or entity that seeks to provide services or goods to the city, county, city and county, or special district in the following areas: accounting, financing, hardware and software maintenance, health care, human resources, human services, information technology, telecommunications, janitorial maintenance, legal services, lobbying, marketing, office equipment maintenance, passenger vehicle maintenance, property leasing, public relations, public safety, social services, transportation, or waste removal.

I. Article 3.7. Best Value Construction Contracting For Counties Pilot Program

These new code sections, effective January 1, 2016 to January 1, 2020, establish a pilot program for the counties of Alameda, Los Angeles, Riverside, San Bernardino, San Diego, Solano, and Yuba for construction projects in excess of $1,000,000. The bidder may be selected on the basis of best value to the county in conformance with PCC sections 20115.3 to 20155.6. The additional statutes within this section set forth the definitions procedures, prequalification procedures, selection of best value contractor, and withholding of retention.

PCC § 20155 – Pilot program for construction projects.

PCC § 20155.1 – Definitions.

PCC § 20155.2 – Additional definitions.

PCC § 20155.3 – Award of best value contracts; procedures.

PCC § 20155.4 – Prequalification or shortlisting of best value contractor; commitment to use of skilled and trained workforce.

PCC § 20155.5 – Selection of best value contractor.

PCC § 20155.6 – Withholding of retention proceeds.

PCC § 20155.7 – Report to legislative committees.

PCC § 20155.8 – Effect of article.

PCC § 20155.9 – Duration of article.

J. Article 60.4.: Job Order Contracting for School Districts

These new sections of the Public Contract Code, replacing the repealed Article 60.3, now allows the use of job order contracts, not just for the Los Angeles Unified School District as was previously the case, but for all school districts. The job order contracts must be competitively bid and awarded to bidders provided the most qualified responsive bids, provided that the school district has entered into a project labor agreement.

The maximum total dollar amount that may be awarded under a single job order contract shall not exceed $5,000,000 in the first term of the job order contract, and, if extended or renewed to a maximum of $10,000,000 over the subsequent two terms of the job order contract. No single job order may exceed $1,000,000.

PCC § 20919.20 – Legislative findings and declarations.

PCC § 20919.21 – Definitions.

PCC § 20919.22 – Job order contracting; use as alternative to other

authorized or required contracting procedures.

PCC § 20919.23 – Labor compliance program; execution plan.

PCC § 20919.24 – Bidding.

PCC § 20919.25 – Contract amount; contract length.

PCC § 20919.26 – Subcontractors.

PCC § 20919.27 – Prevailing wages.

PCC § 20919.28 – Willful violation by contractor or subcontractor.

PCC § 20919.29 – Employment of apprentices.

PCC § 20919.30 – Violations; penalties.

PCC § 20919.31 – Prevention of fraud, waste, and abuse.

PCC § 20919.32 – Payment resolution process; committee.

PCC § 20919.33 – Duration of article.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC § 10110 – Historic restoration projects

This amended statute, effective January 1, 2016, revises the threshold dollar amount from $25,000 to $50,000 in connection with bid requirements for work associated with historic restoration for the state park system.

B. PCC § 10187.5 – Definitions

This amended statute, under Article 6 State Agency Design-Build Projects, in conjunction with PCC 20155(a) (under Article 3.7 Best Value Construction Contracting for Counties Pilot Program) and PCC §§ 20155.1, 20155.2, 20155.3, 20155.4, 20155.5, 20155.6, 20155.7, 20155.8, 20155.9, and 22161, establishes a pilot program to allow the Counties of Alameda, Los Angeles, Riverside, San Bernardino, San Diego, Solano, and Yuba to select a bidder on the basis of best value, for construction projects in excess of $1,000,000.

C. PCC § 10340 - Bids or proposals; minimum number; exceptions; documentation of solicitation

Under this amended section (which is under Article 4, Contract for Services) ordinarily state agencies are required to secure at least three competitive bids or proposals for each contract. However, three competitive bids or proposals are not required in a number of

situations, which now also includes the limited purpose of researching or developing precision medicine in a contract between the office of planning and research, the Regents of the University of California, or an auxiliary organization of the California State University.

D. PCC § 20111.6 - Prequalification questionnaire and financial statement; requirements for certain projects; system of rating bidders; standardized proposal form; process for prequalifying prospective bidders; application

This amended statute (under contracting by Local Agencies and applicable to School Districts under Article 3) sets forth various prequalification questionnaire requirements applicable to projects of greater than $1,000,000 awarded on or after January 1, 2015, and further revises some of the technical aspects of this code section.

Existing law authorizes state agencies to enter into contracts for the acquisition of goods or services upon approval by the Department of General Services. Existing law sets forth various requirements and prohibitions for those contracts, including, but not limited to, a prohibition on entering into contracts for the acquisition of goods or services of $1,000,000 or more with a contractor that discriminates between spouses and domestic partners or same-sex and different-sex couples in the provision of benefits. Existing law provides that a contract entered into in violation of those requirements and prohibitions is void and authorizes the state or any person acting on behalf of the state to bring a civil action seeking a determination that a contract is in violation and therefore void. Under existing law, a willful violation of those requirements and prohibitions is a misdemeanor.

E. PCC § 20150.1 – Necessity of bidding procedures; law governing. (Article 3.6: Counties of 500,000 or Less Population)

This amended statute, applicable to counties of 500,000 or less in population, permits a county, whether general law or charter, to award individual annual contracts as provided in **§** 20128.5 (for repair, remodeling, or other repetitive work to be done according to unit prices.)

F. PCC § 22030 – Application of article (Article 3: Public Projects: Alternative Procedure)

This amended statute, providing for uniform construction cost accounting procedures, now applies to a county, whether general law or charter, containing a population of less than 500,000 which may award individual annual contracts pursuant to PCC §20128.5 (repair, remodeling, or other repetitive work to be done according to unit prices).

G. PCC § 22161 – Definitions (Chapter 4: Local Agency Design-Build Projects)

These code sections (allowing for design-build) within Chapter 4, Local Agency Design-Build projects, have been modified. In connection with this Design-Build Authority, §22161 now includes the San Diego Association of Governments. A project shall also include development projects adjacent, or physically, or functionally related, to transit facilities developed or jointly developed by a local agency.

III. REPEALED STATUTES

A. PCC § 10299 – Consolidation of needs of multiple state agencies in order to increase buying power; provision of services to school districts

This statute was repealed effective January 1, 2016.

IV. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES

A. Education Code § 17250.55 - Design-Build Contracts: Duration of chapter, and related

Existing law authorizes the governing board of a school district, until January 1, 2020, and upon determination that it is in the best interest of the school district, to enter into a design-build contract for both the design and construction of a school facility if that expenditure exceeds $2,500,000. Now, those provisions will become inoperative on July 1, 2016, and instead, until January 1, 2025, a school district, with the appropriate approval of its board, may procure design-build contracts in excess of $1,000,000, and may award the contract to either the low bidder, or by the best value method.

B. Education Code § 17407.5 – Use of skilled and trained workforce to perform project or contract work

This added Education Code section when read in conjunction with Education Code sections 17406 and 17407 (dealing with lease-leasebacks) requires that all workers be either skilled journey persons or apprentices registered in an apprenticeship program. These provisions also tie in with Public Contract Code § 20111.6

C. Labor Code § 1720.4 – Work performed by volunteers, volunteer coordinators, or conservation corps members; exemption from chapter; retroactive application

Existing law with respect to the requirement of payment of prevailing wages or public works does not apply to specified work performed by a volunteer, a volunteer coordinator, or a member of the California Conservation Corps, or a community conservation corp. These provisions effective until January 1, 2017, are now extended until January 1, 2024.

D. Labor Code § 1720.7 – "Public works" additional definition; "general acute care hospital" and "rural general acute care hospital" defined

This added statute expands the definition of "public works" for the purposes of provisions relating to the requirement of payment of prevailing wages, to also include any construction, alteration, demolition, insulation, or repair work done under private contract on a project for a general acute care hospital, except on a project for a rural general acute care hospital with a maximum of 76 beds, when the project is paid for, in whole or in part, with the proceeds of conduit revenue bonds issued after January 1, 2016.

E. Labor Code § 1720.9 – Entities hauling or delivering ready-mixed concrete for public works contracts awarded on or after July 1, 2016; prevailing wage rate; written subcontract agreements; submission of certified copies of payroll records

This addition to the Labor Code expands the definition of "public works" to include the hauling and delivery of ready-mixed concrete in connection with a public works contract, with respect to contracts involving any state agency or any political subdivision of the state. It requires the applicable prevailing wage rate to be the rate for the geographic area in which the concrete factory or batching plant is located. It requires the entity hauling or delivering ready-mixed concrete to enter into a written subcontract agreement with, and to provide employee payroll records and time records to, the party who engaged that entity.

F. Labor Code § 3075 – Apprenticeship programs; administration; necessary conditions

Existing law provides for the establishment of apprenticeship programs in various trades, to be approved by the Chief of the Division of Apprentice Standards within the Department of Industrial Relations, in any trade in the state or in a city or trade area, whenever the apprentice training needs justify the establishment of same. This amendment revises the conditions for when the apprentice training needs in the building and construction trades justify a new apprentice program. It removes the authority of the California Apprenticeship Council to approve a new apprenticeship program justified by special circumstances by regulation.

V. RECENT CALIFORNIA SUPREME AND APPELLATE COURT DECISIONS

A. PUBLIC WORKS

1. *DeSilva Gates Construction, LP v. Department of Transportation* (App.3rd Dist. 2015)___Cal.App.4th___

- **Waiver of bid irregularity gives second low bid public works contractor unfair advantage**

This Court of Appeal decision of the Third Appellate District involved an award of a public works contract by the Department of Public Transportation and a holding that the Department erroneously rejected a bid by plaintiff as non-responsive; and erred by awarding the contract to another bidder despite that bidder's failure to comply with a material requirement of the information for bids. The court determined that the department provided a bidder with an "unfair advantage" by giving the option to not provide the additional information required and thereby effectively withdrawing its bid without risking its bid bond. The court reiterated the holding of the *Valley Crest* decision that a "waiver of an irregularity in a bid should only be allowed if it would not give that bidder an unfair advantage by allowing

the bidder to withdraw its bid without forfeiting its bid bond." The takeaway from this is that a public entity should not invite a bidder to cure a post-opening bid defect if doing so would allow it to effectively withdraw its bid without loss of its bid bond; if a defect in a bid is initially considered to be material it should not later be waived; and a bidder should not be deemed non-responsive on a minor technicality, unless it is a material failure.

2. *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (App. 2nd Dist. 2015) 234 Cal.App.4th 748, 237 Cal.App.4th 261, as modified, review denied

- **Second lowest bidder permitted to sue low bidder who engaged in pervasive practice of non-payment of prevailing wages on multiple public works projects**

This decision by the Court of Appeal, Second District, held for the first time that a second-place bidder on a public works contract may sue a winning bidder who failed to pay its workers prevailing wages, under the business tort of intentional interference with prospective economic advantage. Between 2009 and 2012, American Asphalt South was awarded 23 public works contracts totaling more than $14.6 million throughout Los Angeles, Orange, San Bernardino, and San Diego Counties. Two of the losing bidders on those projects, Roy Allan Slurry Seal, and Doug Martin Contracting, Inc., sued American in each of those counties for intentional interference with prospective economic advantage and also under the Unfair Practices Act (B&P Code §17000 et seq.) and the Unfair Competition Law (B&P Code §17200). The argument was that American Asphalt South was able to submit the low bid because it did not pay its workers prevailing wages, and had it paid prevailing wages as was required, the two other contractors would have been the lowest bidders on the projects.

Knowing the potential negative ramifications that this decision might have in connection with public contracting, a dissenting opinion noted the following: "Although the majority says this expansion of the tort will permit the second lowest bidder to sue the winning bidder who won the award by engaging in illegal conduct, there is no reason why the newly expanded tort will not provide a cause of action to *every* bidder that alleges all the lower bidders engaged in wage theft, or predatory pricing, or bribery… or engaged in any other kind of illegal conduct. Imposing a duty upon each bidder owed to competing bidders giving rise to an actionable claim of interference with prospective economic advantage would disrupt, increase the cost, and delay the completion of public works."

3. *Fairview Valley Fire, Inc. v. California Department of Forestry and Fire Protection* (App.4th Dist. 2015) 233 Cal.App.4th 1262

- **Formal competitive bid process not required for emergency fire equipment**

This Court of Appeal decision from the Fourth District affirmed the lower court decision that the department, in approving in advance the vendors from whom it will actually later hire emergency fire equipment, was not required to employ the formal competitive bid process as set forth in the PCC. Under the express terms of the department's written policies,

and procedures, no binding contract arises between it and an equipment vendor until a vendor's equipment is actually dispatched by the department in an emergency. Accordingly, the emergency exemption to the competitive bid procedures set forth in PCC 10340 (b) (1) applies to the department's emergency hiring, and the trial court did not err in sustaining the department's demurrer to the plaintiff's declaratory relief claim challenging the agency's emergency equipment hiring process.

4. *Floyd Henson et al., v. C. Overaa & Company* (App. 2nd Dist. 2015) 238 Cal.App.4th 184

- **Public works contractor required only to hire apprentices in same occupation as journeymen employed, and not per specific work performances**

This Appellate decision from the First District involved a dispute concerning the type of apprentices required to be hired on this particular public works project. The general contractor Overaa had been involved in the construction of dozens of water and sewage treatment systems in northern California. It was signatory to a collective bargaining agreement with the Laborers Union and was required as such to employ craft laborers represented by the Laborers Union and hire apprentices enrolled in a state-approved apprenticeship program sponsored by the Laborers Union. Much of the work involved the installation of process piping. The Pipe Fitters Union through its member Floyd Henson sued Overaa alleging that it was required to hire apprentices qualified to work on process piping from their Union. The Appellate Court affirmed the trial court's summary judgment in favor of defendant Overaa where the journeymen on the relevant projects were classified as laborers, and prevailing wage law merely requires it to hire apprentices who are in the same occupation as the journeymen on their projects. The court noted that the prevailing wage law requires contractors to endeavor, "to the greatest extent possible," to employ apprentices during the same time period as journeymen in the same craft or trade (Labor Code § 177.5, subd.(h)). The court noted that: "if as, Appellants contend, a journeyman's craft or trade is defined exclusively by the work processes that he or she is carrying out, that journeyman's craft or trade can vary from moment to moment. This would also mean that a contractor might need to constantly rotate apprentices to match the craft or trade being performed on the jobsite. We agree with the trial court that appellants' reading of the statute has the potential to place an unreasonable burden on the contractors."

5. *James L. Harris Painting & Decorating, Inc. v. West Bay Builders, Inc.* (App.3rd Dist. 2015) 239 Cal.App.4th 1214, as modified

- **No prevailing party under prompt payment statutes**

This Court of Appeal decision from the Third District involved fee-shift in provisions in the prompt payment statutes, B & P Code § 7108.5 and PCC §§ 7107 and 10262.5. It involved the construction of the Caesar Chavez High School for the Stockton Unified School District in 2004. The trial court determination was upheld that neither side had prevailed, given that one of the defendants also brought a cross-complaint in this construction payment dispute and therefore the trial court appropriately denied the motion for fees under the prompt

payment statutes. The Court of Appeal noted that "West Bay and Safeco did manage to defeat Harris' prompt payment claims. However, West Bay and Safeco did not obtain the defense verdict by demonstrating timely payments were made to Harris under the prompt payment statutes. To the contrary, the jury found West Bay did not act in good faith in withholding payment to Harris in June 2004." Thus, the Third District affirmed, holding that the lower court had discretion to determine if any side was the prevailing party for purposes of the prompt payment statute-fee shifting, and that in this case there was no prevailing party.

6. *Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc.* (App. 1st Dist. 2014) 232 Cal.App.4th 808

- **Prime contractor not entitled to any right to retention funds prior to project completion**

This Court of Appeal decision from the First District, which came down in late December 2014, concerned a dispute between a contractor and a school district concerning a construction project that the contractor did not complete. It involved a project for the Pittsburg Unified School District for the reconstruction and modernization of a high school. The District attempted, after hiring a replacement contractor to complete the work and while its litigation with the contractor was pending, to withdraw retention funds from the escrow account. Amoroso sought a preliminary injunction to prevent its withdraw arguing that the District could not withdraw these funds until a court determined that it had defaulted. Amoroso had contended that the retention funds in escrow accounts were in part for the benefit of its subcontractors and therefore subject to an express trust. The court rejected that argument because it conflated progress payments with retention. Funds held as retention were not amounts to be paid to the contractor, and the court rejected Amoroso's argument that it had any right to retention funds prior to completion of the project which it did not do. As such, the District did not hold funds in trust for the benefit of Amoroso's subcontractors.

7. *East West Bank v. Rio School District (FTR International, Inc.)* (App. 2nd Dist. 2015) 235 Cal.App.4th 742

- **Doctrine of unclean hands does not exculpate District from having to pay school contractor its contract balance, extra work, delay and disruption, statutory penalties, attorney's fees, prejudgment interest, and costs**

This decision by the Second District Court of Appeal involved a payment dispute between a general contractor and a public entity in connection with a construction of a school. After the school was completed, the school district and its general contractor engaged in a decade-long legal battle. The contractor obtained a judgment against the District in excess of nine million dollars. During construction, the contractor submitted approximately 150 proposed change orders most of which were denied by the District. The District retained over $600,000 dollars and refused to release most of it after all stop notices were resolved. They also refused to compensate the contractor for alleged damages caused by delay and disruption. After a 243 day court trial the court found in favor the contractor for damages for the balance

due for the contract and extra work it performed, delay and disruption, statutory penalties pursuant to Public Contract Code Section 7107, attorney's fees, prejudgment interest and costs. The Appellant Court affirmed the trial court's decision and also rejected the District's defense of the doctrine of unclean hands.

8. *Jeff Tracy, Inc. v. City of Pico Rivera* (App. 2nd Dist. 2015) 240 Cal. App.4th 510

- **Contractor ordered by trial court to "disgorge" compensation**

This Court of Appeal decision from the Second District followed a bench trial in which the trial court found the general contractor (Jeff Tracy, Inc.) did not have a valid license while performing work on a project for the City of Pico Rivera. It then ordered Tracy to disgorge all compensation paid to the City in the amount of nearly five and a half million dollars. Tracy contended that the judgment must be reversed because the trial court improperly denied it a jury trial on the issues of whether it had a valid license and the amount of disgorgement. The Court of Appeal agreed that it was entitled to a jury trial on these issues and reversed.

9. *Judicial Council of California v. Jacobs Facilities, Inc.* (App. 1st Dist. 2015) 240 Cal.App.4th 160a

- **Attorney fee award reversed and case remanded for hearing on B&P § 7031(e) substantial compliance evidence re contractor license expiration**

This Court of Appeal decision from the First District involved a suit brought by the Judicial Council of California, administrative office of the courts, arising out of a facilities contract which required the defendant contractor to be licensed pursuant to the requirements of the Business and Professions Code when it commenced work on the project. The trial court's judgment and attorney fee award entered on the jury's verdict was reversed insofar as the defendant had violated the contractor's state license law when it continued to act as the contracting party after its contractor license had expired. The case was remanded for a hearing on the issue of substantial compliance pursuant to Business and Professions Code § 7031 (e).

10. *Stephen K. Davis v. Fresno Unified School District* (App. 5th Dist. 2015) 237 Cal.App.4th 261

- **Lease-leasebacks (LLBs) in connection with public works construction required to include both leasing and financing component**

This Court of Appeal decision from the Fifth District weighed in on the appropriateness of a lease-leaseback arrangement (LLB) between a public entity and a construction company. This decision, considered a setback to those public entities who have been extensively using the LLB process, is explicit in that it any such arrangement needs to actually include both a leasing and a financing component. Many Districts have not been

doing so, using the LLB arrangement in place of design-bid-build, or otherwise authorized design-build, or CM-at risk delivery methods.

11. *Griselda Castro v. City of Thousand Oaks* (App. 2nd Dist. 2015) 239 Cal.App.4th 1451

- **Add on pedestrian warning beacon in crosswalk that was not part of original design was not subject to design immunity defense**

This Court of Appeal decision for the Second District involved an action in connection with an alleged dangerous condition of public property, specifically a crosswalk at the intersection of Live Oak Street and Thousand Oaks Boulevard in Thousand Oaks and a pedestrian warning beacon. The driver of a vehicle did not see the warning beacon or plaintiffs and they were hit in the crosswalk and sustained personal injuries. The city defended on the basis that the City engineer had discretionary authority to approve the beacon warning design and that the Complaint was barred by the design immunity provisions of Gov. Code Section 830.6. Plaintiffs contended that the warning beacon was not part of the original approved project design. The Court held that this add-on which was not a part of the approved plan or design which was installed after the project was approved, did not come under the umbrella of the design immunity, in that there were material triable issues of fact that the crosswalk/street intersection was a dangerous condition of a public property. The court concluded by stating "Appellants' theory is that the warning beacon, even though intended to make the crosswalk safer, did the opposite and lulled pedestrians to think it was safe to cross. This is a jury question. Reasonable minds could differ on whether, under the totality of the circumstances, the intersection/crosswalk posed a substantial risk of injury to a pedestrian exercising due care."

12. *Newark Unified School District v. Superior Court of Alameda County* (App. 1st Dist. 2015) 239 Cal.App.4th 33

- **Documents produced pursuant to a California Public Records Act request that inadvertently contained privileged documents may not be reviewed or disseminated**

This decision, by the First Appellate District, held that documents requested under the California Public Records Act (Gov. Code § 6250 et seq.) are not necessarily disclosed under Section 6254.5 when a public agency (Newark Unified School District) in response to the requests, it inadvertently included over a hundred documents that the District contends are subject to the attorney-client or attorney-work privileges.

The Public Records Act (PRA) generally provides that documents retained by public agencies must be disclosed to the public, subject to various exceptions. One exception is that documents subject to the attorney-client and attorney work product privileges need not be disclosed. However, Government Code section 6254.5 provides that once a privileged document is "disclosed" by a public agency, the privilege is then waived. The Appellate Court

held that the subject documents were not necessarily disclosed under section 6254.5 insofar as the public agency inadvertently released the documents subject to the attorney-client and attorney work product privileges. The Court stated "we construe section 6254.5 not to apply to an inadvertent release of privileged documents."

B. PRIVATE WORKS

1. *Art Womack v. Davis A. Lovell* (App. 4th Dist. 2015) 237 Cal.App.4th 772

- **Defendant judicially "admits" appropriate general contractor's licensure status by allegations in Complaint**

This decision, from the Court of Appeal for the Fourth District, involved a major home remodeling contract dispute. At the conclusion of trial the homeowner's attorney made a motion for non-suit based on the absence of a verified certificate of licensure. Although this was not an issue in the case, there was no certificate of licensure that could be produced at that time, and the trial judge reluctantly granted the homeowner's nonsuit motion. The Court of Appeal reversed and held that because the plaintiff stated that the contractor was a "licensed contractor" in his Complaint and made a claim against the Contractor's License Bond in the Complaint, the homeowner had judicially admitted that the contractor was duly licensed, even though the Complaint was unverified.

2. *Hyundai Amco America, Inc. v. S3H, Inc. (*App. 4th Dist. 2014) 232 Cal.App.4th 572

- **Party requesting arbitration not required to make formal demand because other party filed a Complaint**

This Court of Appeal decision for the Fourth District involved a dispute over arbitration between a general contractor and its subcontractor. The lower court order denying a petition to order arbitration was remanded to the trial court. Under Civil Code § 1281.2, a party requesting a court order for arbitration must prove the existence of a written agreement to arbitrate, and that the other party refuses to arbitrate. This was established and the court held that the party requesting arbitration was not required to make a formal demand for arbitration because the other party filed a Complaint invoking the protections and procedures of the court system, which was thus an effective refusal to arbitrate. Accordingly, the requesting party had met its burden under section 1281.2.

3. *Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (App. 1st Dist. 2015) 240 Cal.App.4th 763

- **Despite forum selection provisions in a contract, construction contract disputes must be litigated in California**

The Court of Appeal for the First District, in an interpretation of Civil Code Section 410.42 which precludes out of state contractors from requiring California subcontractors to litigate certain contract disputes in the contractor's home state, reversed the trial court's granting of defendant's motion to dismiss.

4. *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (App. 4th Dist. 2015) 238 Cal.App.4th 468

- **Subcontractor liable in both general contractor indemnity claim and insurance subrogation claim**

The California Court of Appeal for the Fourth District held that a subcontractor was liable in the face of both an indemnity claim brought by a general contractor, as well as a subrogation claim brought by the general contractor's insurance company. Litigation followed after an individual suffered severe injuries from diving into a swimming pool. The Court of Appeal reversed the judgment of the claim of express indemnity and remanded for further proceedings, but affirmed in all other respects.

5. *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (App. 2nd Dist. 2015) ___Cal.App.4th___

- **Civil Code § 8818 attorney fee award reversed**

This Court of Appeal decision for the Second District involved a payment dispute between a contractor and its subcontractor. After the work on the project was completed, the subcontractor sent a demand to the contractor to pay for change order damages that it claimed the contractor caused by mismanaging the project. The contractor refused to pay, and also delayed forwarding the subcontractor share of retention payments that it had received from the owner. The trial court's judgment in favor of the contractor was reversed with respect to retention payments and attorney's fees where the contractor was liable because it failed to meet the requirements of the modified total cost theory on several bases of the change order requirements of the contract. As a result, the Civil Code § 8818 fee award against the subcontractor was reversed, and on remand the subcontractor was allowed to pursue its fees against the contractor.

6. *McMillin Albany LLC v. The Superior Court of Current County (Carl Van Tassell)* (App. 5th Dist. 2015) 239 Cal.App.4th 1132

- **Right to Repair Act held to provide exclusive remedy for construction defects involving new construction**

This Appellate decision from the Fifth Appellate District involved a construction defect action brought by plaintiff against the builder. The builder moved to stay the litigation until there was compliance with the statutory non-adversarial pre-litigation procedures of the "Right to Repair Act" which applies to construction defect litigation involving residential construction. Plaintiff contended that the statutory pre-litigation procedures did not apply because he had dismissed the only cause of action in his Complaint that alleged a violation of the Right to Repair Act. The Appellate Court for the Fifth District held that the Right to Repair Act does in fact provide the exclusive remedy for construction defect claims involving new residential construction, whether the damages alleged are actual or economic damages. (The California Appellate Courts are now split in this regard, with the Court of Appeals for the Second and Fourth Districts holding that the Right to Repair Act does not provide the exclusive remedy for construction defect claims involving actual, as opposed to economic damages in new residential construction.)

7. *State Ready Mix, Inc. v. Moffatt & Nichol* (App. 2nd Dist. 2015) 232 Cal.App.4th 1227

- **Concrete supplier held responsible for its bad batch of concrete and the court held the civil engineer to not be responsible for same**

This Appellate decision by the Second District involved a bad batch of concrete that was used to construct a harbor pier. The plaintiff contract supplier wrote the concrete mix design (the recipe), and then later blamed the bad concrete on the civil engineer who had drafted the pier plans and helped the general contractor by later reviewing the concrete mix. The court in noting that "the concrete was hastily and erroneously mixed and delivered to the project site," denied plaintiff's cross-complaint for equitable indemnity against the civil engineer.

8. *First American Title Ins. Co. v. Spanish Inn, Inc.* (App. 4th Dist. 2015) 239 Cal.App.4th 598

- **Written Indemnity Agreement requirements upheld**

This Appellate decision by the Fourth District was one of several appeals arising over the renovation of a Palm Springs Hotel. The project developers challenged the trial court's granting of summary judgment in favor of the title insurer, which sought contractual indemnity from the developers for legal expenses incurred in defending the project's construction lender against mechanic's lien foreclosure actions. The Court of Appeal affirmed the decision, holding that First American established through undisputed evidence that it was

entitled to indemnity under the Indemnity Agreement, and concluded that the trial court did not err by granting the motion for summary adjudication.

9. *David Belasco v. Gary L. Wells* (App. 2nd Dist. 2015) 234 Cal.App.4th 409

- **Civil Code § 1542 waiver and release effectively bars subsequent claims for construction defects**

This Court of Appeal decision for the Second District involved construction defects in connection with a newly constructed residence in Manhattan Beach in 2004. There had been a $25,000 settlement at an earlier date of construction defects with a Civil Code Section 1524 waiver and release of all known and unknown claims, followed several years later by a lawsuit, this time with respect to alleged roof defects later discovered. The Appellate Court affirmed the trial court's granting of summary judgment, ruling that the action was barred as a matter of law by the earlier settlement agreement that had included a release and waiver of all claims, known, or unknown, in connection with the construction of the property. The result was a broad application of the principle that a settlement agreement which includes a Section 1542 waiver acts to bar any subsequent claims within the potential 10 year statute of limitation.